BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOSEPH W. URBANEK	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,014,692
GALAMET, INC., d/b/a KAW RIVER RECYCLING	)	
Respondent	)	
AND	)	
	)	
WAUSAU INSURANCE GROUP/LIBERTY	)	
MUTUAL INSURANCE COMPANY	)	
Insurance Carriers	)	

ORDER

Respondent appeals the July 27, 2006 Award of Administrative Law Judge Bryce D. Benedict. The Appeals Board (Board) heard oral argument on November 15, 2006.

APPEARANCES

Claimant appeared by his attorney, Bruce Alan Brumley of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Andrew D. Wimmer of Overland Park, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ). At oral argument to the Board, the parties stipulated that claimant's last day with respondent was July 30, 2003. However, claimant was paid through August 15, 2003, as claimant was paid two weeks vacation pay after leaving respondent's employment.

ISSUES

1. Did claimant suffer personal injury by accident arising out of and in the course of his employment?

2. Did claimant carry his burden that he was temporarily and totally disabled from September 4, 2003, through January 18, 2004?

3. Is respondent entitled to a credit for claimant's preexisting disability under K.S.A. 44-501(c)?

4. What is the nature and extent of claimant's injuries and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

Claimant, a long-term employee of respondent, Massey & Sons, suffered accidental injury arising out of and in the course of his employment with respondent on March 14, 2002, when he fell from a piece of heavy equipment. Claimant was provided medical treatment for that injury and returned to work for respondent by David Jones, M.D., claimant's treating physician. Dr. Jones' records show that on May 17, 2002, he gave claimant restrictions of no lifting over 20 pounds, with frequent lifting and/or carrying up to 10 pounds. On July 1, 2002, claimant told Dr. Jones that he was increasing his lifting to 50 pounds. Claimant advised Dr. Jones that a 20-pound limit would put him out of a job. Dr. Jones did not specifically authorize claimant to lift over 20 pounds, but claimant advised he was lifting up to 50 pounds. By the time claimant returned to work, respondent had been bought by Kaw River Recycling (currently Galamet, Inc., d/b/a Kaw River Recycling). This injury (the March 2002 injury) was assigned Docket No. 1,012,938 and was settled in a lump sum settlement on August 25, 2005, for $50,000.00.

When claimant returned to work for respondent, he initially performed work involving weighing, paying for and unloading scrap iron. He also operated heavy machinery, including backhoes and forklifts. Shortly after returning to work, claimant was performing heavy lifting up to 100 pounds. Claimant acknowledged that he sought help with some of the heavy lifting. But he continued with the heavy lifting tasks until July 30, 2003, his last day worked with respondent.

Claimant testified at his deposition on May 21, 2004, that his pain remained about the same through his last day worked. However, claimant also testified at the regular hearing on April 27, 2006, that his need for pain medication increased after his return to work. He was also taking more muscle relaxers and had an increased need to rest. Claimant lived across the street from respondent's place of business. As his need for rest

increased, he would go home and lie down, sometimes twice in the morning and twice in the afternoon.

Claimant underwent an MRI in April 2002, which showed claimant had degenerative changes at L3-4 and L5-S1 with a moderately small herniation at L5-S1. Claimant underwent another MRI on July 11, 2003, which displayed a marked increase in the severity of claimant's back condition. The spinal stenosis had increased to a marked level at L3-4 and L5-S1 and severe at L4-5. When claimant was examined by Dr. Jones on August 20, 2003, he noted that claimant was not supposed to be working. Dr. Jones wrote a note dated September 4, 2003, indicating claimant should not be working, as work was making his condition worse.

Dr. Jones testified that claimant's condition continued to worsen as a result of his continued work. When told of claimant's testimony that his pain remained the same, he stated that claimant was a laborer. When claimant awoke in the morning, he was in pain. He would then take as much pain medication as was required to reduce the pain to a manageable level. As claimant's condition worsened, his need for pain medication also went up. Dr. Jones stated that claimant's return to work and continued heavy lifting caused a marked increase in the severity of claimant's back condition.

Claimant was referred for surgery to Chris E. Wilson, M.D. Claimant underwent partial laminectomies of L2, L3, L4 and L5 with bilateral partial medial facetectomies at L2-L3, L3-4 and L4-5, a lumbar diskectomy at L5-S1 with bilateral partial medial facetectomies and internal foraminotomies and a free fat graft, under the hand of Dr. Wilson.

After surgery, claimant was released by Dr. Jones with restrictions limiting claimant's lifting to 10 pounds occasionally and less than 10 pounds for frequent lifting and carrying. Claimant was limited to standing less than 2 hours and sitting less than 6 hours. Claimant was prohibited from crouching, stooping and climbing ladders. He would be unable to work an 8-hour day, with the possibility of working 4 to 6 hours per day if allowed to change positions frequently. He would also have to be allowed frequent breaks every 15 to 45 minutes.

At Dr. Jones' request, claimant underwent a functional capacity evaluation (FCE). After the FCE, claimant was returned to work, with lifting limits of 55 pounds occasionally and 45 pounds frequently for overhead lifts. Waist level lifts were limited to 100 pounds occasionally and 50 pounds frequently. Floor to waist level lifts were limited to 70 pounds occasionally and 45 pounds frequently.[1] Dr. Jones testified that in his opinion, there is no

[1] Sandow Depo., Ex. 2.

way that claimant could work a full 8-hour day at any activity. He could work maybe 4 to 6 hours a day as long as he was able to alternate all of his positions at will whenever he felt like he had to change his position in order for comfort.[2] And Dr. Jones put restrictions on how many hours claimant can work each day with normal breaks.[3]

Claimant was referred by his attorney to board certified orthopedic surgeon Theodore L. Sandow, Jr., M.D., for an examination. Dr. Sandow first saw claimant on October 22, 2003, with a second examination on February 22, 2005. Dr. Sandow diagnosed claimant with chronic lumbosacral strain with radiculopathy, central lumbar spinal stenosis, status post decompression partial laminectomies at L2-3, 4 and 5 and narcotic dependency. He assessed claimant a 15 percent whole person impairment based on the fourth edition of the AMA *Guides*.[4] Of the 15 percent rating, Dr. Sandow opined that 10 percent was from the initial injury in March 2002 and the remaining 5 percent was due to a worsening or aggravation from claimant's ongoing work with respondent. Claimant was restricted from prolonged sitting, standing or walking, with no repetitive bending, stooping or twisting, and no lifting over 25 pounds. Claimant was further limited to a maximum of 45 minutes work, with 15-minute breaks thereafter. Dr. Sandow was asked to review the task list prepared by vocational expert Dick Santner. Of the 7 tasks on the list, Dr. Sandow found claimant unable to perform 4, for a 57 percent task loss.

Claimant was examined by board certified internal medicine and occupational medicine specialist Dick A. Geis, M.D. The first examination was on December 23, 2003, at the request of respondent's attorney. The second examination was on April 4, 2006, at the request of claimant's attorney. After the second examination, Dr. Geis found claimant to have a 25 percent whole person functional impairment pursuant to the fourth edition of the AMA *Guides*.[5] Of this 25 percent, 75 percent (or 18 percent of the whole person) was attributable to the original injury in 2002, and 25 percent (or 7 percent of the whole person) was attributable to claimant's continued work. Using the task list of Dick Santner, Dr. Geis found claimant unable to perform 3 of 7 tasks, for a 43 percent task loss. Dr. Geis noted the only difference between the 2003 and 2006 examinations was the reduction in claimant's range of motion in 2006. Overall, claimant's pain symptoms were the same at each examination. Dr. Geis did agree that people on daily narcotic pain medication were prone to develop a tolerance to the medication, requiring greater doses in order to achieve the same pain relief. He restricted claimant from lifting, pushing or pulling greater

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[2] Jones Depo. at 23.

[3] Jones Depo. at 98-99.

[4] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[5] AMA *Guides* (4th ed.).

than 20 pounds. Repetitive lifting, pushing and pulling was limited to a maximum of 10 pounds. Claimant should be allowed to change position every 30 minutes, with a 10-minute rest period every hour. Claimant should not walk more that 100 feet and should do only minimal stair climbing. Claimant was restricted from any lifting or work above his shoulders.

Claimant was examined at respondent attorney's request by board certified orthopedic surgeon Edward J. Prostic, M.D., on May 12, 2006. The history provided to Dr. Prostic included the March 14, 2002 injury and the March 2004 surgery to claimant's low back. Dr. Prostic determined that the injury which necessitated the surgery was the 2002 fall. He testified that claimant's current symptoms were the natural and probable consequence of his 2002 fall. He agreed that he did not know what claimant's job duties were when he returned to work at respondent. Dr. Prostic admitted that he was not aware that claimant had to lift weights of 80 to 100 pounds after returning to work. He admitted that if claimant were required to lift up to 100 pounds, that information would be pertinent in determining whether there was a worsening after the March 14, 2002 accident. He agreed that kind of work could cause a permanent worsening of claimant's condition.

Dr. Prostic was shown a report generated by vocational expert Terry Cordray, which listed jobs which, in Dr. Prostic's opinion, claimant could perform. Those jobs, including hotel clerk, embroidery machine operator and retail sales clerk, were all jobs that claimant was physically capable of performing. Dr. Prostic did not express an opinion on whether claimant possessed the vocational requirements to do those jobs.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[6]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[7]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[8]

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[6] K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

[7] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[8] K.S.A. 44-501(a).

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[9]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[10]

In workers compensation litigation, it is not necessary that work activities cause an injury. It is sufficient that the work activities merely aggravate a preexisting condition. This can also be compensable.[11]

When a primary injury under the Workers Compensation Act arises out of and in the course of a worker's employment, every natural consequence that flows from that injury is compensable if it is a direct and natural result of the primary injury.[12]

Here, claimant suffered an accidental injury on March 14, 2002, for which he received treatment and, after returning to work, settled the claim. When he returned to work, he ultimately began performing his regular duties for respondent. This required he lift up to 100 pounds on a regular basis through his last day with respondent. There is some indication in this record that claimant's condition is merely a continuation of the original injury suffered in 2002. However, claimant clearly exceeded his restrictions from Dr. Jones when he returned to work with respondent. While claimant testified that his pain level did not increase, it is explained by Dr. Jones that the pain level described by claimant was actually being masked by the ever increasing amounts of pain medication being

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[9] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[10] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[11] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

[12] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

utilized by claimant. Claimant's description of the efforts he was required to use in order to continue doing his job with respondent contradicts claimant's own testimony that his condition did not worsen after his return to work. The Board finds that claimant suffered an aggravation of his earlier low back injury after returning to work for respondent, with the date of accident being his last day worked with respondent.

When dealing with a series of injuries which occur microscopically over a period of time, the Kansas appellate courts have established a bright line rule for identifying the date of injury in a repetitive, microtrauma situation, such as carpal tunnel syndrome. The date of injury for repetitive injuries in Kansas has been determined to be either the last day worked or the last day before the claimant's job is substantially changed.[13] The Board finds claimant's condition continued to worsen through July 30, 2003, his last day worked with respondent.

Respondent objects to an award of temporary total disability compensation (TTD) to claimant for the period from September 4, 2003, through January 18, 2004. Respondent, in its brief to the Board, argues that there is no medical evidence regarding claimant's ability to work from September 4, 2003, through January 18, 2004. However, Dr. Jones wrote a note on August 6, 2003, stating that claimant was not able to work. Also, in a September 4, 2003 note, Dr. Jones warns that claimant's back condition is being aggravated by his work and will continue to worsen if claimant continues to lift at work. The Board affirms the ALJ's award of TTD benefits for the period from September 4, 2003, through January 18, 2004.

The Board must next address the nature and extent of claimant's injuries and disability. Vocational expert Terry Cordray stated that claimant was able to earn $8.00 per hour. However, Mr. Cordray acknowledged that if the restrictions of Dr. Jones or Dr. Sandow were followed, claimant was unemployable. Likewise, vocational expert Dick Santner testified that if the restrictions of Drs. Geis, Sandow or Jones were followed, claimant was unemployable.

Dr. Jones limited claimant to standing 2 hours or less, with a maximum of less than 6 hours sitting. Claimant would also have to take regular breaks every 15 to 45 minutes. Dr. Sandow testified that claimant would require 15-minute breaks every 45 minutes.

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[13] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999); *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003).

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment.[14]

An injured worker is permanently and totally disabled when rendered "essentially and realistically unemployable."[15] In *Wardlow*, the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills, making him essentially unemployable, as he was only capable of part-time sedentary work. Here, claimant has spent practically his whole life performing physical labor jobs. His recent injuries with respondent have greatly limited his job possibilities. Dr. Prostic testified that claimant had the physical ability to work as a hotel clerk, an embroidery machine operator and a retail sales clerk. But no one in this record has stated that claimant had the vocational skills to perform those jobs. Having the physical ability without the vocational ability is not the same thing as an ability to earn wages. It is just frustration for the worker. In looking at all the circumstances of this claimant's condition, including the serious and permanent nature of claimant's injuries, the very limited physical abilities remaining and claimant's lack of training, coupled with the constant pain and necessity of constant position changes and rest periods, the Board finds this claimant essentially and realistically unemployable.

The Board will next consider respondent's request for an offset for claimant's preexisting functional impairment. K.S.A. 44-501(c) states:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.[16]

The Board has allowed the deduction of a preexisting functional impairment from an award of permanent total disability in the past.[17]

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[14] K.S.A. 44-510c(a)(2).

[15] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

[16] K.S.A. 44-501(c).

[17] *Van Gorden v. IBP, Inc.*, No. 199,461 & 199,462, 1999 WL 1008042 (Kan. WCAB Oct. 5, 1999); *Hoge v. Concrete Service Co. Inc.*, No. 251,937, 2002 WL 31103963 (Kan. WCAB Aug. 30, 2002); *Remmenga v. Technical Irrigation Service*, No. 237,147, 2004 WL 2337671 (Kan. WCAB Sept. 2004).

However, the Kansas Court of Appeals in *McIntosh*[18] recently addressed permanent total disability and the offset allowed under K.S.A. 44-501(h), which allows an offset for federal social security or retirement benefits. The Kansas Supreme Court affirmed the decision of the Court of Appeals.[19] In *McIntosh*, the Court of Appeals considered the Board's method of computing the retirement offset against an award of permanent total disability. The Board reduced the worker's weekly compensation amount and also reduced the total award below the $125,000.00 statutory maximum allowed for permanent total disability compensation awards. The Court of Appeals, in considering K.S.A. 44-510f, determined that the legislature intended that workers compensation payments for a permanent total disability continue until the employee no longer is permanently and totally disabled, or until the $125,000.00 cap had been paid, whichever event occurs first.[20] The Court of Appeals reasoned that the purpose of workers compensation for permanent total disability is wage replacement. Moreover, the purpose of the benefit offset under K.S.A. 44-501(h) is to prevent against wage-loss duplication. The Court of Appeals then stated that "[b]oth of these purposes can be accomplished by reducing the weekly workers compensation payments for the duration of the disability."[21] The Court of Appeals rationalized that a,

> . . . duplication of wage-loss benefits does not occur when workers compensation payments continue for the duration of a permanent total disability or until the $125,000 cap on an employer's liability is met under K.S.A. 44-510f(a)(1). Rather, under such circumstances, weekly workers compensation payments have the appropriate reduction for social security and other retirement benefits. Therefore, an employee would never be receiving more in weekly benefits than the employee's workers compensation payments would have been without the offset under K.S.A. 44-501(h).[22]

The end result of the offset under K.S.A. 44-501(h) is to delay the amount of time it takes to reach the $125,000 statutory cap on an employer's liability.

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[18] *McIntosh v. Sedgwick County*, 34 Kan. App. 2d 684, 692, 123 P.3d 740 (2005).

[19] *McIntosh v. Sedgwick County*, ___ Kan. ___, ___ P.3d ___ (2006) (Case No. 93,762, filed December 8, 2006.

[20] *McIntosh v. Sedgwick County*, 34 Kan. App. 2d at 691.

[21] *Id.* at 692.

[22] *Id*. at 692.

Here, however, the purpose of the offset is different. K.S.A. 44-510e defines functional impairment as,

> . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[23]

Rather than wage replacement, functional impairment compensates a worker for physiological loss after an injury. Therefore, the wage replacement rational of *McIntosh* in allowing the full $125,000 to be paid would not apply to the K.S.A. 44-501(c) offset. To apply the offset against the preexisting functional impairment in the same manner as in *McIntosh* would render the offset ineffective.

> It is a fundamental rule of statutory construction, to which all other rules are subordinate, that the intent of the legislature governs if that intent can be ascertained.[24]

The Board finds that the computation method utilized by the ALJ in the Award properly applies the offset under K.S.A. 44-501(c).

The Board, therefore, finds the Award of the ALJ should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bryce D. Benedict dated July 27, 2006, should be, and is hereby, affirmed.

The record does not contain a filed fee agreement between claimant and claimant's attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel

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[23] K.S.A. 44-510e(a).

[24] *Matter of Marriage of Killman*, 264 Kan. 33, 955 P.2d 1228 (1998) (citing *City of Wichita v. 200 South Broadway*, 253 Kan. 434, 855 P.2d 956 [1993]).

desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.[25]

IT IS SO ORDERED.

Dated this ____ day of January, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING AND DISSENTING OPINION

The undersigned Board Members agree with the majority's finding that claimant has been rendered realistically unemployable as a direct result of his work injuries and is, therefore, entitled to an award of compensation based upon a permanent total disability. We further agree that a credit for claimant's preexisting impairment of function should be applied to this award. However, the undersigned would follow the procedure outlined by the Kansas Supreme Court in *McIntosh*,[26] whereby the credit is applied to reduce the dollar amount of the weekly disability payments, but the payments continue for the duration of the disability until the maximum total benefit is fully paid.

BOARD MEMBER

[25] K.S.A. 44-536(b).

[26] *McIntosh v. Sedgwick County*, ___ Kan. ___, ___ P.3d ___ (2006) (Case No. 93,762, filed December 8, 2006.

BOARD MEMBER

c: Bruce Alan Brumley, Attorney for Claimant
Andrew D. Wimmer, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge